

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ZEPHANIAH BULLOCK,

Case No. 3:14-cv-00139-MMD-VPC

Petitioner,

ORDER

v.

RENE BAKER, et. al.,

Respondents.

This is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court are petitioner's renewed motion for the appointment of counsel, respondents' motion to file an exhibit under seal, and respondents' motion to dismiss the petition. (Dkt. nos. 18, 14, 10).

**I. PROCEDURAL HISTORY**

In the Eighth District Court for the State of Nevada, petitioner was convicted, pursuant to a guilty plea, of two counts of attempted robbery with the use of a deadly weapon. (Exhs. 10 & 11.)<sup>1</sup> Pursuant to his guilty plea, the state district court sentenced petitioner as follows: On Count I, attempted robbery, 36 months to 120 months, plus a consecutive term of 18 to 120 months for the use of a deadly weapon. On Count II, attempted robbery, 36 to 120 months, plus a consecutive term of 18 to 120 months for the use of a deadly weapon. Count II runs concurrent with Count I. Petitioner was

---

<sup>1</sup>The exhibits referenced in this order are found in the Court's record at dkt. nos. 11-13.

1 credited with 129 days for time served. (Exh. 14.) The judgment of conviction was filed  
2 on February 24, 2011. (Exh. 14.) Petitioner did not pursue a direct appeal.

3 On March 5, 2013, petitioner filed a *pro se* post-conviction habeas petition in the  
4 state district court. (Exh. 18.) The state district court ruled that the petition was  
5 procedurally barred as untimely and that petitioner had not shown good cause to  
6 excuse the delay in filing his petition. (Exh. 27 at 4-5.) The state district court granted  
7 petitioner an evidentiary hearing on petitioner's claim that he was deprived of an  
8 opportunity to file a direct appeal. (*Id.* at 5.) On July 11, 2013, the state district court  
9 issued a written order denying the remainder of the petition as untimely. (Exh. 30.)

10 On June 20, 2013, the state district court held a *Lozada*<sup>2</sup> evidentiary hearing on  
11 petitioner's claim that he told his public defender that he wanted to appeal after  
12 sentencing. (Exh. 29.) The evidentiary hearing was continued to July 25, 2013, so that  
13 petitioner could call additional witnesses. (Exh. 32.) Following testimony by petitioner  
14 and his public defenders, the state district court ruled that petitioner had not  
15 communicated to his counsel that he wanted to file a direct appeal. (Exh. 32 at 17-18.)  
16 On September 25, 2013, the state district court entered a written order finding that  
17 petitioner was not deprived of his right to file a direct appeal. (Exh. 46.)

18 Petitioner appealed the denial of his post-conviction petition and the denial of his  
19 *Lozada* claim. On January 21, 2014, the Nevada Supreme Court affirmed the district  
20 court's rulings. (Exh. 60.) Specifically, the Nevada Supreme Court ruled that because  
21 petitioner filed his post-conviction habeas petition more than two years after the entry of  
22 the judgment of conviction, the petition was untimely pursuant to NRS § 34.726(1). (*Id.*  
23 at 1.) The Nevada Supreme Court further ruled that petitioner had not shown good  
24 cause to excuse the delay in filing his petition. (*Id.*) Additionally, it ruled that the record  
25 supported the state district court's denial of petitioner's *Lozada* appeal-deprivation  
26 claim. (*Id.* at 2.) Remittitur issued on February 18, 2014. (Exh. 63.)

27  
28 

---

<sup>2</sup>*Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

1           Petitioner dispatched his federal petition to this Court on March 12, 2014. (Dkt.  
2 no. 4.) On December 23, 2014, respondents filed a motion to dismiss the petition. (Dkt.  
3 no. 10.) Concurrently, respondents filed a motion to file an exhibit under seal. (Dkt. no.  
4 14.) Petitioner did not oppose respondents' motions, but he has filed a renewed motion  
5 for the appointment of counsel. (Dkt. no. 18.)

## 6       **II.       RESPONDENTS' MOTION TO SEAL EXHIBIT**

7           Concurrent with the filing of their motion to dismiss, respondents filed exhibits  
8 consisting of the state court record. (Dkt. nos. 11, 12, 13, 15.) Respondents seek  
9 permission to file under seal Exhibit 12, petitioner's presentence report, which contains  
10 confidential information. (Dkt. no. 14.) The presentence report was submitted under seal  
11 for *in camera* review. (Dkt. no. 15.)

12           There is a strong presumption in favor of public access to judicial filings and  
13 documents. *See Nixon v. Warner Communication, Inc.*, 435 U.S. 589, 597 (1978); *see*  
14 *also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2006);  
15 *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1134 (9<sup>th</sup> Cir. 2003). The court  
16 has inherent power over its own records and files, and access may be denied where the  
17 court determines that the documents may be used for improper purposes." *Nixon v.*  
18 *Warner Comm., Inc.*, 435 U.S. at 598; *Hagestad v. Tragesser*, 49 F.3d 1430, 1433-34  
19 (9<sup>th</sup> Cir. 1995); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9<sup>th</sup> Cir.  
20 2006).

21           The Ninth Circuit distinguishes between dispositive and nondispositive pleadings  
22 and motions in terms of the showing required to seal a document. For a document filed  
23 with a dispositive motion, "compelling reasons" must be shown to justify sealing the  
24 document. *Kamakana v. City and County of Honolulu*, 447 F.3d at 1179-89. In contrast,  
25 for documents filed with non-dispositive motions, a "good cause" showing will suffice to  
26 keep the records sealed. *Id.* This is based on the reasoning that the public has less  
27 need for access to records that are merely tangentially related to the underlying cause  
28 of action. *Id.* at 1179. A showing of good cause generally requires a specific description

1 of the particular document(s) sought to be sealed and a showing that disclosure of such  
 2 documents would work a “clearly defined and serious injury.” *Pansy v. Borough of*  
 3 *Stroudsburg*, 23 F.3d 772, 776 (3<sup>rd</sup> Cir. 1994). Where good cause is shown for a  
 4 protective order, the court must balance the potential harm to the moving party’s  
 5 interests against the public’s right to access the court files. *Kamakana v. City and*  
 6 *County of Honolulu*, 447 F.3d at 1179-89.

7 The petitioner’s presentence report was submitted in support of respondents’  
 8 motion to dismiss the petition, which is a dispositive motion. The presentence report  
 9 (Exh. 12) contains confidential information concerning petitioner, as defined under NRS  
 10 § 176.156. On balance, the potential harm to the parties’ interests outweighs the  
 11 public’s right to access petitioner’s presentence report. Respondents have made an  
 12 adequate showing of compelling reasons to keep petitioner’s presentence report sealed.  
 13 Accordingly, the Court grants respondents’ motion to seal the presentence report.

### 14 **III. PETITIONER’S RENEWED MOTION FOR APPOINTMENT OF COUNSEL**

15 On March 30, 2015, petitioner filed a renewed motion for the appointment of  
 16 counsel. (Dkt. no. 18.) Previously, petitioner filed a motion for the appointment of  
 17 counsel, which this Court denied by order filed July 24, 2014. (Dkt. no. 3 at 1-2.)  
 18 Petitioner has no constitutional right to appointed counsel in a federal habeas corpus  
 19 proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999  
 20 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is within the Court’s  
 21 discretion. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S.  
 22 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S.  
 23 838 (1984). As stated in this Court’s order of July 24, 2014, the petition on file is  
 24 sufficiently clear in presenting the issues that petitioner wishes to bring and the issues in  
 25 this case are not complex. Petitioner’s renewed motion for the appointment of counsel  
 26 contains nothing that causes this Court to alter its decision to deny the appointment of  
 27 counsel. Petitioner’s renewed motion for the appointment of counsel is denied.

28 ///

#### IV. RESPONDENTS' MOTION TO DISMISS

Respondents move to dismiss the petition because it is untimely. (Dkt. no. 10.) The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one of two ways — either by the conclusion of direct review by the highest court, including the United States Supreme Court, to review the judgment, or by the expiration of the time to seek such review, again from the highest court from which such direct review could be sought.” *Wixom v. Washington*, 264 F.3d 894, 897 (9<sup>th</sup> Cir. 2001). Once the judgment of conviction becomes final, the petitioner has 365 days to file a federal habeas petition, with tolling of the time for filing during the pendency of a properly filed

1 application for state post-conviction or other collateral review with respect to the  
2 pertinent judgment. 28 U.S.C. § 2244(d)(1), (2). A habeas petitioner's state post-  
3 conviction petition, which was rejected by the state court as untimely under the statute  
4 of limitations, is not "properly filed," within the meaning of the statutory tolling provision  
5 of the AEDPA limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005).

6 A criminal defendant in Nevada has thirty (30) days from the entry of judgment to  
7 file his notice of appeal. Nev. R. App. P. 4(b). If the defendant does not seek direct  
8 review from the highest state court, the conviction becomes final when the time for  
9 seeking such review expires. 28 U.S.C. § 2244(d)(1)(A); *Hemmerle v. Schriro*, 495 F.3d  
10 1069, 1073-74 (9<sup>th</sup> Cir. 2007); *Wixom v. Washington*, 264 F.3d at 898. Once the  
11 judgment of conviction is final, the defendant has one year to file a federal habeas  
12 petition. 28 U.S.C. § 2244(d).

13 In the present case, petitioner's judgment of conviction was filed on February 24,  
14 2011. (Exh. 14.) Petitioner did not pursue a direct appeal of his judgment of conviction.  
15 Where a petitioner does not appeal from his judgment of conviction, the one-year  
16 AEDPA limitations period begins to run on the date on which the time to seek appeal  
17 expires. 28 U.S.C. § 2244(d)(1)(a); NRAP 4. Thus, petitioner's conviction became final  
18 on March 26, 2011, which was the deadline for filing a direct appeal from the judgment  
19 of conviction. The one-year AEDPA statute of limitations began to run on March 26,  
20 2011, and expired on March 25, 2012. The first page of the federal habeas petition  
21 indicates that the petition was dispatched (given to prison staff for mailing) to this Court  
22 on March 12, 2014. (Dkt. no. 4 at 1, item 5.) This Court deems petitioner's federal  
23 petition to be filed on March 12, 2014. *See Houston v. Lack*, 487 U.S. 266, 270 (1988)  
24 (pursuant to the "mailbox rule," federal courts deem the filing date of a document as the  
25 date that it was given to prison officials for mailing). As such, the federal petition was  
26 filed almost two years after the AEDPA statute of limitations had expired.

27 The Court notes that petitioner's state post-conviction habeas petition was not a  
28 "properly filed" application for post-conviction relief or other collateral review of the

1 judgment, and therefore, the petition did not toll the statute of limitations. Specifically,  
2 petitioner's state post-conviction habeas petition, which was untimely filed on March 5,  
3 2013, did not statutorily toll the AEDPA statute of limitations. (Exh. 18.) The state district  
4 court denied the petition as untimely, as it was filed over two years after the judgment of  
5 conviction was entered. (Exh. 30.) In the order of affirmance, the Nevada Supreme  
6 Court held that petitioner's post-conviction habeas petition was untimely pursuant to  
7 NRS § 34.726 and that petitioner failed to demonstrate good cause for the delay in filing  
8 his petition. (Exh. 60.) Because it was untimely under state law, the state post-  
9 conviction habeas petition was not a "properly filed application" that would toll the  
10 AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. at  
11 412-16. The federal habeas petition was filed nearly two years after the AEDPA statute  
12 of limitations had expired. Petitioner has not presented this Court with equitable tolling  
13 or other cause to excuse the untimely filing of the federal petition. As such, this action is  
14 dismissed as untimely.

## 15 **V. CERTIFICATE OF APPEALABILITY**

16 District courts are required to rule on the certificate of appealability in the order  
17 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a  
18 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In  
19 order to proceed with his appeal, petitioner must receive a certificate of appealability. 28  
20 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,  
21 950-951 (9<sup>th</sup> Cir. 2006). Generally, a petitioner must make "a substantial showing of the  
22 denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. §  
23 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must  
24 demonstrate that reasonable jurists would find the district court's assessment of the  
25 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order  
26 to meet this threshold inquiry, the petitioner has the burden of demonstrating that the  
27 issues are debatable among jurists of reason; that a court could resolve the issues  
28 differently; or that the questions are adequate to deserve encouragement to proceed

1 further. *Id.* In this case, no reasonable jurist would find this Court's dismissal of the  
2 petition debatable or wrong. The Court therefore denies petitioner a certificate of  
3 appealability.

4 **VI. CONCLUSION**

5 It is therefore ordered that respondents' motion to seal (dkt. no. 14) the  
6 presentence report is granted. The Clerk of Court shall keep the presentence report  
7 (dkt. no. 15) filed under seal.

8 It is further ordered that petitioner's renewed motion for the appointment of  
9 counsel (dkt. no. 18) is denied.

10 It is further ordered that respondents' motion to dismiss (dkt. no. 10) is granted.

11 It is further ordered that the petition is dismissed with prejudice as untimely.

12 It is further ordered that petitioner is denied a certificate of appealability.

13 It is further ordered that the Clerk of Court shall enter judgment accordingly.

14 DATED THIS 3<sup>rd</sup> day of September 2015.

15  
16 

17 MIRANDA M. DU  
18 UNITED STATES DISTRICT JUDGE  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28